



# CALIFORNIA FARM BUREAU FEDERATION

## NATURAL RESOURCES AND ENVIRONMENTAL DIVISION

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*Via First-Class Mail & Email*  
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Office of Environmental Compliance  
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*Via First-Class Mail & Email*  
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***Re: Comments on the BDCP EIR / EIS; State Clearinghouse Number: 2008032062.***

Dear Ms. Rinek and Ms. Brown:

The California Farm Bureau Federation ("California Farm Bureau") is a non-governmental, non-profit, voluntary membership California corporation whose purpose is to protect and promote agricultural interests throughout the state of California and to find solutions to the problems of the farm, the farm home and the rural community. California Farm Bureau is California's largest farm organization, comprised of 53 county California Farm Bureaus currently representing approximately 85,000 members in 56 counties. California Farm Bureau strives to protect and improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food and fiber through responsible stewardship of California's resources.

California Farm Bureau appreciates the opportunity to submit comments on the Notice of Intent/Notice of Preparation of a draft Environmental Impact Statement/Environmental Impact Report ("EIS/EIR") for the Bay Delta Conservation Project ("BDCP"), which encompasses requirements of the federal Endangered Species Act ("ESA"), the California Endangered Species Act ("CESA") and the State of California's Natural Communities Conservation Planning Act ("NCCPA"); as well as, DWR's (and potentially State and Federal water contractor's) intention to apply for ESA and CESA incidental take permits ("ITP") for water operations and management activities in the Sacramento-San Joaquin Delta.

California Farm Bureau supports the BDCP process and the collaboration among many different stakeholders. Nevertheless, California Farm Bureau has reservations about how impacts to agricultural resources will be addressed in the upcoming environmental review. California Farm Bureau is concerned that the Fish & Wildlife Service, Bureau of Reclamation, National Marine Fisheries Service, and the Department of Water Resources (hereinafter “Agencies”) may fail to recognize that agricultural land and water quality resources are a part of the physical environment, thus consideration of impacts to agricultural resources must be included as part of a proper National Environmental Policy Act (“NEPA”) and California Environmental Quality Act (“CEQA”) environmental review.

### **Agricultural Resources Must Be Considered During Environmental Review**

Agricultural resources are an important feature of the existing environment of the State, and are protected under federal policies, such as the Farmland Protection Policy Act and NEPA, State policies, and CEQA. Agriculture is the number one industry in California, which is the leading agricultural state in the nation.<sup>1</sup> Operation of the Central Valley Project and the State Water Project helped to transform agriculture throughout the State. Agriculture is one of the foundations of this State's prosperity, providing employment for one in 10 Californians and a variety and quantity of food products that both feed the nation and provide a significant source of exports.<sup>2</sup> In 1889, the State's 14,000 farmers irrigated approximately one million acres of farmland between Stockton and Bakersfield. By 1981, the number of acres in agricultural production had risen to 9.7 million.<sup>3</sup> More recently, the amount of agricultural land in the State has declined. From 1982 to 1992, more than a million acres of farmland were lost to other uses. Between 1994 and 1996, another 65,827 acres of irrigated farmland were lost, and this trend is expected to continue.

In order to preserve agriculture and ensure a healthy farming industry, the Legislature has declared that “a sound natural resource base of soils, water, and air” must be sustained, conserved, and maintained.<sup>4</sup> Prior to converting agricultural lands to other uses, decision makers must consider the impacts to the agricultural industry, the state as a whole, and “the residents of this state, each of whom is directly and indirectly affected by California agriculture.”<sup>5</sup>

Both NEPA and CEQA require analysis of significant environmental impacts and irreversible changes resulting from proposed projects. These include unavoidable impacts; direct, indirect, and cumulative effects; irreversible and irretrievable commitment of resources; relationships between short-term uses and long-term productivity; and growth-inducing impacts to the environment. In both CEQA and NEPA, the physical environment includes agricultural lands and resources. Given

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<sup>1</sup> Food & Agr. Code, § 802 subd. (a).

<sup>2</sup> CALFED Final Programmatic EIS/EIR, July 2000, pg. 7.1-1.

<sup>3</sup> Littleworth & Garner, California Water II (Solano Press Books 2007) p. 8.

<sup>4</sup> Food & Agr. Code, § 802 subd. (g).

<sup>5</sup> Food & Agr. Code, § 803.

the national and statewide importance of agriculture and the legal requirements of environmental review, California Farm Bureau urges the Agencies to properly assess all direct and indirect effects on the agricultural environment resulting from the proposed BDCP project in the EIS/EIR.

### **Agricultural Resource Must be Considered In a Legally Defensible NEPA Review**

#### **1. Farmland Protection Policy Act**

As a result of substantial decreases in the amount of open farmland, Congress enacted the Farmland Protection Policy Act (FPPA) in 1981 as part of the Agriculture and Food Act (final rules and regulations were published in the Federal Register on June 17, 1994).<sup>6</sup> In its statement of purpose, the FPPA aims to minimize the extent to which federal programs contribute to the unnecessary and irreversible conversion of farmland to nonagricultural uses. Projects are subject to FPPA requirements if they may irreversibly convert farmland (directly or indirectly) to nonagricultural use and are completed by a Federal agency or with assistance from a Federal agency.<sup>7</sup> Such projects shall also be administered in a manner compatible with local government and private programs and policies to protect farmland.<sup>8</sup>

To help assist federal agencies in minimizing the loss of farmland, guidelines were developed.<sup>9</sup> Prior to progressing with the BDCP project, the Agencies should review these guidelines and incorporate the criteria into their NEPA analysis:<sup>10</sup>

As stated above and as provided in the Act, each Federal agency shall use the criteria provided in § 658.5 to identify and take into account the adverse effects of Federal programs on the protection of farmland. *The agencies are to consider alternative actions, as appropriate, that could lessen such adverse effects*, and assure that such Federal programs, to the extent practicable, are compatible with State, unit of local government and private programs and policies to protect farmland.<sup>11</sup>  
[....]

It is advisable that evaluations and analyses of prospective farmland conversion impacts be made early in the planning process before a site or design is selected, and that, where possible, agencies make the FPPA evaluations part of the National Environmental Policy Act (NEPA) process.<sup>12</sup>

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<sup>6</sup> 7 U.S.C. §§ 4201 et seq.

<sup>7</sup> 7 U.S.C. § 4201.

<sup>8</sup> 7 C.F.R. § 658.4.

<sup>9</sup> See 7 C.F.R. §§ 658.1 et seq.

<sup>10</sup> Agencies are to integrate the NEPA reviews with other agency planning and review processes, and coordinate with other federal agencies and with similar state processes when appropriate. (40 C.F.R. § 1500.2 subd. (c); 40 C.F.R. § 1506.2.)

<sup>11</sup> 7 C.F.R. § 658.4, emphasis added.

<sup>12</sup> 7 C.F.R. § 658.4 subd. (e).

## 2. NEPA

In addition to the FPPA, NEPA itself requires review of the agricultural environment. Title I of NEPA contains a Declaration of National Environmental Policy which requires the federal government to use all practicable means to create and maintain conditions under which man and the environment, including the agricultural environment, can exist in productive harmony.<sup>13</sup> Section 102<sup>14</sup> requires federal agencies to incorporate environmental considerations in their planning and decision-making through a systematic interdisciplinary approach.<sup>15</sup> Specifically, all federal agencies are to prepare detailed statements assessing and evaluating the environmental impact of and alternatives to major federal actions significantly affecting the environment.<sup>16</sup>

Given the magnitude and scope of the BDCP project, significant environmental impacts, including direct, indirect, and cumulative effects, will occur. In determining “significance” under NEPA, the discussion in the BDCP EIS/EIR should focus on the “context” and the “intensity” of the impacts.<sup>17</sup> Under NEPA, context “means that the significance of an action must be analyzed in several contexts such as society as whole (human, national), the affected regions, the affected interests, and the locality.”<sup>18</sup> Intensity is measured, in part, by considering: (1) unique characteristics of a geographic area such as proximity to historic or cultural resources, parkland, prime *farmlands*, wetlands, wild and scenic rivers, or ecological critical areas; (2) the degree which the effects on the quality of the human environment are likely to be highly controversial; (3) the degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principal about a future consideration; (4) *whether the action is related to other actions with*

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<sup>13</sup> 42 U.S.C. §§ 4321 et seq.

<sup>14</sup> Among other things, Section 102(2) of NEPA requires agencies to:

(C) Include in every recommendation or report on proposals for legislation and other major Federal Actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --

- (i) The environmental impact of the proposed action,
- (ii) Any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) Alternatives to the proposed action,
- (iv) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented; ...

(E) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources. (42 U.S.C § 4332(2)(C), § 4322(2)(E).)

<sup>15</sup> 42 U.S.C § 4332(2).

<sup>16</sup> *Id.*

<sup>17</sup> 40 C.F.R. § 1508.27.

<sup>18</sup> *Id.*, *emphasis added*.

*individually insignificant but cumulatively significant impacts*; (5) whether the action threatens a violation of federal, state, or local law or requirements imposed for the protection of the environment.<sup>19</sup>

California Farm Bureau would like to caution the Agencies against overlooking their obligation to consider impacts to agricultural resources, as many federal agencies have made this mistake in the past. On August 30, 1976 the Council on Environmental Quality (“CEQ”) issued a memorandum to federal agencies informing them of the need to consider farmland loss as a potentially significant environmental impact. On August 20, 1980, the CEQ issued the following additional guidance to the heads of agencies regarding losses of agricultural lands because:

Approximately one million acres of prime and unique agricultural lands are being converted irreversibly to non-agricultural uses each year. Actions by federal agencies such as construction activities, development grants and loans, and **federal land management decisions** frequently contribute to the loss of prime and unique agricultural lands directly and indirectly. Often these losses are unintentional and are not necessarily related to accomplishing the agency’s mission.<sup>20</sup>

For this reason, the CEQ advised:

If an agency determines that a proposal significantly affect[s] the quality of the human environment, it must initiate the scoping process [cite omitted] to identify those issues, **including effects on prime or unique agricultural lands, that will be analyzed and considered, along with the alternatives available to avoid or mitigate adverse effects...** The effects to be studied include ‘growth inducing effects and other effects related to inducing changes in the patterns of land use...cumulative effects...mitigation measures...to lessen the impact on...agricultural lands.’<sup>21</sup>

Clearly in light of this guidance, the Agencies must consider agricultural resources as part of the physical environment when undertaking its NEPA analysis of alternatives, direct and indirect impacts, cumulative impacts, and mitigation alternatives for the BDCP EIS/EIR.

### **Agricultural Resource Must be Considered In a Legally Defensible CEQA Review**

One of the major principles of the State’s environmental and agricultural policy is to sustain the long-term productivity of the State’s agriculture by conserving and protecting the soil, water, and

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<sup>19</sup> *Id.*, *emphasis added*.

<sup>20</sup> 45 Fed. Reg. 59189, *emphasis added* (see copy of document attached marked Attachment A).

<sup>21</sup> *Id.*, *emphasis added* (attached).

air that are agriculture's basis resources.<sup>22</sup> As currently proposed, the BDCP project alternatives will convert agricultural lands to other uses, including land for habitat restoration, conveyance facilities, and levee improvements. This conversion would add to the existing statewide conversion of substantial amounts of agricultural lands to other uses, and may conflict with adopted plans of many local governments, including cities and counties, and existing HCPs.

Since the environmental review for the BDCP will result in a joint State and Federal environmental document, the Agencies must consider the fact that CEQA also recognizes agricultural land and water resources as a part of the physical environment. Any and all adverse environmental effects on agricultural resources resulting from the BDCP project, as well as cumulative impacts that will occur over time, must be fully assessed and disclosed under CEQA, as well as avoided or mitigated as required by CEQA.

In CEQA, "[s]ignificant effect on the environment" means, "a substantial, or potentially substantial, adverse change in the environment."<sup>23</sup> The CEQA Guidelines make it clear the "environment" in question encompasses, "any physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise and objects of historic or aesthetic significance."<sup>24</sup> For further guidance as to the exact meaning of "significance," the CEQA Guidelines provide a list of 29 general effects that will cause a project to "normally have a significant effect on the environment."<sup>25</sup>

Of particular relevance is CEQA Guidelines Appendix G, section II, Agricultural Resources, which states the following:

In determining whether impacts to agricultural resources are significant environmental effects, lead agencies may refer to the California Agriculture Land Valuation and Site Assessment Model (1997) prepared by the California Department of Conservation as an optimal model to use in assessing impacts on agriculture and farmland. Would the project:

- (a) Convert prime farmland, unique farmland, or farmland of state-wide importance . . . to non-agricultural use?
- (b) Conflict with existing zoning for agricultural use or a Williamson Act contract?
- (c) Involve other changes in the existing environment which, due to their location or nature, could result in conversion of farmland to non-agricultural use?

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<sup>22</sup> Food & Agr. § 821 subd. (c).

<sup>23</sup> Pub. Resources Code, § 21068.

<sup>24</sup> Pub. Resources Code, § 21060.5.

<sup>25</sup> Cal. Code Regs., tit. 14, § 15000 et seq. ("CEQA Guidelines, Appendix G).

### **Specific Environmental Concerns That Must Be Analyzed in the Joint EIS/EIR**

Having reviewed the Notice of Intent and the Notice of Preparation, California Farm Bureau has identified several specific concerns relating to agricultural resources that should be analyzed in the BDCP EIS/EIR, as follows:<sup>26</sup>

- **Accurate and Complete Identification of Agricultural Resources:** The agricultural lands surrounding the BDCP Project must be accurately and completely depicted. The California Department of Conservation (“DoC”), through the farmland Mapping and Monitoring Program (“FMMP”), monitors changes in Prime farmland, Farmland of Statewide Importance, Unique Farmland, and Farmland of Local Importance. The EIS/EIR must incorporate the FMMP Maps as a basis for its analysis. The acreage of farmland that will be converted and/or impacted from this project must be included in the EIR/EIS. Additionally, any other changes in the existing environment due to the project which, due to their location or nature, could result in conversion of agricultural to nonagricultural use must also be examined.

California Farm Bureau also recommends that any agricultural impact discussion for areas outside existing Important Farmland Map boundaries be based on the agricultural land definition in the Williamson Act.<sup>27</sup> This would also be in accordance with the definition of “agricultural land” in CEQA. Public Resources Code Section 21060.1 provides:

- (a) “Agricultural land” means prime farmland, farmland of statewide importance, or unique farmland, as defined by the United States Department of Agriculture land inventory and monitoring criteria, as modified for California.
  - (b) In these areas of the state where lands have not been surveyed for the classifications specified in subdivision (a), “agricultural land” means land that meets the requirements of “prime agricultural land” as defined in paragraph (1), (2), (3), or (4) of subdivision (c) of section 51201 of the Government Code.
- **Accurate and Complete Analysis of All of the Impacts:** The impact analysis in the EIS/EIR must not be limited to the amount of area that would be physically occupied by the BDCP Project. The analysis should consider the construction of ancillary facilities and supporting infrastructure, mitigation areas, as well as growth-inducing impacts and social and economic impacts. These potentially significant impacts must not be overlooked.

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<sup>26</sup> Note: this list is not exhaustive.

<sup>27</sup> The California Land Conservation Act of 1965 (Government Code, §§ 51200 *et seq.*), commonly known as the “Williamson Act.”

Furthermore, the permanent and temporary disturbances caused directly by construction activities must be fully analyzed in the EIS/EIR.

- **A Full Range of Alternatives Must be Examined:** The Agencies shall identify and rigorously examine all reasonable alternatives for the BDCP project.<sup>28</sup> The range of alternatives must be feasible and must avoid or substantially lessen the project's significant environmental effects<sup>29</sup> *"even if these alternatives would impede to some degree the attainment of the project objectives or would be more costly."*<sup>30</sup> A feasible alternative is one that is "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors."<sup>31</sup>
- **All Impacts to Agricultural Resources Must be Fully Mitigated:** All feasible mitigation measures proposed in the EIS/EIR to address the impacts to agricultural resources must be fully described and must mitigate for the impacts. A project of this magnitude has the potential to convert significant amounts of agricultural land to nonagricultural use. To address this, sufficient funding should be allocated for mitigation of agricultural land loss on a per acre basis.<sup>32</sup>
- **This Project Must Comply With the Williamson Act:** The Williamson Act provides a tax incentive for the voluntary enrollment of agricultural and open space lands in ten year contracts between local government and landowners. The contract enforceably restricts the land to agricultural and open space uses and defined compatible uses. A project such as this would not be compatible with the Williamson Act. Each local government that participates in the Williamson Act designates certain boundaries within their jurisdictions as

<sup>28</sup> 40 C.F.R. §§ 1500.2 subd. (e), 1501.2 subd. (c), 1502.1, 1502.14 subd. (a), 1502.15 subd. (d).

<sup>29</sup> Pub. Resources Code, §§ 21002, 21001.1(a), 21100(b)(4), 21150.

<sup>30</sup> Cal. Code Regs., tit. 14, § 15126.6, subd. (b), *emphasis added*.

<sup>31</sup> See Pub. Resources Code, § 21061.1; Cal. Code Regs., tit. 14, § 15364.

<sup>32</sup> The Agencies should consult with applicable county and local governments to assess local agricultural mitigation measures. For example, San Joaquin County and Yolo County have adopted ordinances to preserve agricultural land through the use of agricultural easements for agricultural land lost to development. San Joaquin County requires a 1:1 mitigation ratio for any "General Plan amendment that changes the designation of any land from an agricultural to a nonagricultural use" or any "Zoning Reclassification that changes the permitted use from agriculture to a nonagricultural use, regardless of the General Plan designation." (*San Joaquin County General Plan*, Section 9-1080.3(a) (c)) Yolo County requires a 1:1 mitigation ratio for any "conversion or change from agricultural use to a predominantly non-agricultural use..." (*Yolo County General Plan*, Section 8-2.2416(3)) In addition, various cities within the counties of the Delta have adopted their own agricultural mitigation measures. The cities of Brentwood, Davis, Gilroy, and Stockton have also adopted ordinances to preserve agricultural land through the use of agricultural easements for agricultural land lost to development. Brentwood requires a 1:1 mitigation ratio "by any applicant for a subdivision or any other discretionary land use entitlement which will permanently change agricultural land ... to any nonagricultural use." (*Brentwood Municipal Code*, Section 17.730.030(A)(B).) Davis requires that "[t]otal mitigation for a development project shall not be less than a ratio of two acres of protected agricultural land for each acre converted from agricultural land to nonagricultural land." (*Davis Municipal Code*, Section 40A.03.025(c).)



“agricultural preserve” and land within these boundaries can be enrolled in the Williamson Act. Once enrolled, local governments calculate the property tax assessment based on the actual use of the land instead of the potential land value assuming full development.

A Williamson Act contract lasts a minimum of ten years, and automatically renews each year, so that a minimum ten year contract is always in effect. A nonrenewal of the contract can be filed by either the landowner or the local government. Unless the contract is cancelled<sup>33</sup>, the restrictions on the use of the property continue for the life of the contract.

Any discussions regarding mitigation for this project must include a discussion of the Williamson Act’s policies regarding public acquisition of and public improvements within, agricultural preserves and on lands under Williamson Act contract.<sup>34</sup> In addition to disfavoring locating public improvements in agricultural preserves, a public agency must consult with the Director of the Department of Conservation whenever it appears likely that a public improvement may be located in an agricultural preserve.

At a minimum, the EIS/EIR must include the following specific information on the agricultural preserves and Williamson Act contracts in the project area: (1) a map detailing the location of agricultural preserves and Williamson Act contracted land with each preserve. The document must also calculate the total amount of acreage under contract, according to land type (prime or non-prime), that could be either directly or indirectly impacted by this project; and (2) the impacts that public acquisition of areas under Williamson Act contracts would have on nearby properties also under contract. This analysis is similar to the “growth-inducing” impacts analysis under CEQA.

- **Public Acquisition of Property for this Project Must be Limited:** It is unclear at this time how much private property will have to be acquired for this project. The least environmentally damaging and practicable alternative must maximize the use of property already owned by the government before acquiring private land. For land under Williamson Act contract, Government Code Section 51291(c) spells out the requirements for government acquisition of land under contract (*see also* Gov. Code, § 51292 for the findings to be made before acquisition). These requirements must be strictly adhered to whenever any property under contract is acquired for this project.
- **Significant and Cumulative Impacts to Water Resources:** The EIS/EIR must also analyze the direct and indirect impacts of this project on water quality, including the indirect conversion of existing farmland for want of adequate and reliable water supply of sufficient quality, especially in areas within the Delta. Water quality impacts, both direct and indirect, resulting from the conversion of agricultural land to non-agricultural uses must be analyzed

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<sup>33</sup> The Williamson Act contract cancellation process is outlined at Gov. Code, §§ 51280 *et seq.*, and requires a specific set of findings which often includes environmental review pursuant to CEQA.

<sup>34</sup> Gov. Code, §§ 51290 *et seq.* contains the state policy against locating public improvements in agricultural preserves and prescribes the requirements that any public agency must take before locating public improvements in agricultural preserves.

and mitigated. Such analysis should include water supply and water quality and should involve an examination of water supply impacts the project may have, and how that might impact the water supply otherwise available for production agriculture.

- **Social and Economic Impacts Must be Analyzed:**<sup>35</sup> The siting of the BDCP Project through agricultural lands will greatly impact the agricultural industry as a whole, as well as local rural communities. These impacts can be far-reaching and include a loss of jobs, a loss of sales tax revenue which leads to a loss of social services, and a loss of agriculturally-related businesses. Such socio-economic impacts are interrelated with the proposed effects on the physical environment and thus, must be evaluated in the EIS/EIR.<sup>36</sup>

### **Mitigation Strategies Must Be Analyzed**

Give the significant environmental impacts of the Project, including impacts to agricultural lands, both NEPA and CEQA require the Agencies to mitigate impacts. Under NEPA, the mitigation of impacts must be considered whether or not the impacts are significant. Agencies are required to identify and include in the EIS/EIR all relevant and reasonable mitigation measures that could improve the proposed action.<sup>37</sup> Under CEQA, an EIR must propose and describe mitigation measures to minimize the significant environmental effects identified in the EIR.<sup>38</sup> A mitigation measure must be designed to minimize, reduce, or avoid an identified environmental impact or

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<sup>35</sup> NEPA and CEQA requirements for the analysis of social and economic impacts differ somewhat. NEPA requires that an EIS consider social and economic effects if they are related to effects on the natural or physical environment, and the NEPA definition of *effects* includes social and economic factors. (40 C.F.R. §§ 1508.8, 1508.14.) However, the intent of NEPA is that social and economic effects alone should not trigger preparation of an EIS. (40 C.F.R. § 1508.14.) CEQA requires analysis of a proposed project's potential impacts on population growth and housing supply, but social and economic changes are not considered environmental impacts in and of themselves under CEQA, although they may be used to determine whether a physical change is significant or not. CEQA also permits discussion of social and economic changes that would result from a change in the physical environment and could in turn lead to additional changes in the physical environment (CEQA Guidelines, § 15064 subd. (f).)

<sup>36</sup> See 40 C.F.R. § 1508.14, [When socioeconomic effects are interrelated with other effects on the physical environment, then all of these impacts should be addressed together in the EIS.].

<sup>37</sup> NEPA regulations define mitigation as:

- (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
- (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
- (c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
- (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
- (e) Compensating for the impact by replacing or providing substitute resources or environments. (40 C.F.R. § 1508.21.)

<sup>38</sup> Pub. Resources Code, §§ 21002.1 subd. (a); 21100 subd. (b)(3); 14 Cal. Code Regs., § 15126.4.

rectify or compensate for that impact.<sup>39</sup> California Farm Bureau urges the Agencies to consider the following mitigation measures for full evaluation within the EIS/EIR:<sup>40</sup>

- Siting and aligning Project features to avoid or minimize impacts on agriculture.
- Examining structural and nonstructural alternatives to achieving project goals in order to avoid impacts on agricultural lands.
- Implementing features that are consistent with local and regional land use plans.
- Supporting the California Farmland Conservancy Project in acquiring easements on agricultural lands in order to prevent its conversion and increase farm viability.
- Restoring existing degraded habitat as a priority before converting agricultural lands.
- Providing water quality reliability benefits to agricultural water users.
- Maintaining water quality standards for all beneficial uses, including agricultural use.
- Focusing habitat restoration efforts on developing new habitat on public lands before converting agricultural land.
- If public lands are not available for restoration efforts, focusing restoration efforts on acquiring lands that can meet ecosystem restoration goals from willing sellers.
- Using farmer-initiated and developed restoration and conservation projects as a means of reaching Program goals.

#### **Due Consideration of Relevant Water Quality and Water Rights Requirements and Constraints Is Needed**

The BDCP project proposes a number of large-scale alterations to the physical environmental of the Sacramento-San Joaquin Delta area, including a significant replumbing of the existing system by means of a new peripheral canal around the Delta, in addition to certain proposed improvements to existing through-Delta water conveyance pathways. Of particular concern to Delta interests—and to the California Farm Bureau, as well, as a statewide organization with many members in the Delta and areas upstream of the Delta, as well as elsewhere throughout the state—are the potential, adverse water quality and water supply and water rights impacts of the proposed project on agricultural water users and agricultural land, both within the Delta itself and in areas of upstream of the Delta. To proceed to successful implementation of the proposed project, a major, but inevitable challenge for the BDCP will be to navigate a complex web of legal and regulatory requirements, reaching far beyond mere compliance with CEQA and NEPA alone.

Under CEQA, a “feasible” project—including any “feasible” alternatives and/or mitigation—is a project that is “capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, *legal*, social, and

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<sup>39</sup> Cal. Code Regs., tit. 14, § 15370.

<sup>40</sup> Please note that this list is not exhaustive and additional mitigation measures addressing agricultural impacts should be analyzed.

technological factors.”<sup>41</sup> By definition, then, a “feasible” project is a project that comports with any laws that might, otherwise, result in an impermissible violation of applicable law or, in some other manner, thwart the project and its successful implementation. It is therefore essential that, in the design, construction, and operation of any new Delta conveyance system or other facilities in the Delta, the BDCP must strictly adhere to established water rights and water quality requirements under applicable state and federal law.

For the BDCP’s consideration in scoping, project development, and eventual project implementation, a number of the more significant constraints and requirements in the area of water rights and water quality are listed below as follows:

1. California’s dual riparian and appropriative water rights system, establishing vested water riparian and appropriative rights (including both pre-1914 and post-1914 appropriative rights) as a species of property right, and also establishing a clear hierarchy of rights and priorities among the various class of water users in times of scarcity or insufficient supply.
2. The Water Code’s Area-, Watershed- and County-of-Origin statutes (Water Code, §§ 108, 10505, 10505.5, 11128, 11460-11463), including the provisions of 11460 and 11463, entitling inhabitants and property owners in the watershed or area of origin, as a matter of first-priority right, to substitute or exchange water supplies, or supplemental water supplies for “adequate compensation,” “reasonably required” to supply existing and/or future beneficial needs in the areas and watersheds of origin.
3. Water Quality, Water Supply, and Water Rights Protections in the Delta Protection Statutes (Water Code, §§ 12200-12233), including:
  - a. The provisions of sections 12202 declaring “the *provision of salinity control and an adequate supply for the users of water in the Sacramento-San Joaquin Delta*” to be one of the “functions to be provided by the [State Water Project], in coordination with the activities of the United States in providing salinity control for the Delta through operation of the Federal Central Valley Project”;<sup>42</sup>
  - b. The provisions of section 12201 declaring a statewide interest in maintaining “*an adequate water supply in the Delta sufficient to maintain and expand agriculture, industry, urban, and recreational development in the Delta area*” and providing “a common source of fresh water for export to areas of water deficiency”;
  - c. The provisions of sections 12200, 12202, 12203, 12204 pertaining to surplus waters, “salinity control and an adequate supply of water for users of water in the Delta,” waters to which Delta users are legally “entitled,” and waters available for export;

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<sup>41</sup> Cal. Code of Regs., tit. 14, § 15364. See also, Pub. Resources Code, §§ 21002, 21002.1, 21061.1, 21081.

<sup>42</sup> See, also, *United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82 at 128-129, 135-136.

- d. The provisions of section 12202 pertaining to a potential substitute water supply for Delta water users in lieu of current, on-going salinity control operations of the CVP and SWP.<sup>43</sup>
4. The so-called “No Injury Rule,” allowing a petitioned change in point of diversion, place, or purpose of use only upon approval of the State Water Resources Control Board, subject to protest by any interested person(s) and such conditions as the Board may impose, and upon a finding, following a public process, that the proposed change “will not operate to the injury of any legal user.”<sup>44</sup>
5. The effect of state and federal antidegradation laws and policies on the proposed action, in terms of potential adverse water quality effects in the absence of feasible and effective measures or actions to avoid or mitigate such adverse effects, including:
  - a. The State of California’s existing antidegradation policy, reaffirming the State’s policy to “**achieve the highest water quality consistent with maximum benefit to the people of the State** [...] so as to promote the peace, health, safety and welfare of the people of the State,”<sup>45</sup> and providing that “existing high quality will be maintained until it has been demonstrated [ ] that any change will be consistent with maximum benefit to the people of the State, **will not unreasonably affect present and anticipated beneficial use of such water** and will not result in water quality less than that prescribed in the policies.”<sup>46</sup>
  - b. Requirements of the existing federal antidegradation policy that “water quality necessary to protect [existing instream water uses] shall be maintained and protected [...] and that quality shall be maintained and protected unless the State finds [...], that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters area located [...] [and] [i]n allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully.”<sup>47</sup>
6. Duly established water quality objectives in any existing or future water quality control plan applicable to waters and existing beneficial uses of the Sacramento-San Joaquin Bay-Delta.

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<sup>43</sup> Note: Such a substitute water supply could consist of an adequate supply of “recirculated” freshwater supplies or of direct or indirect deliveries of water from a Delta conveyance facility, either to Delta channels or to Delta lands themselves. Moreover, such a substitute water supply could be provided either in combination with on-going salinity control operations of the CVP and SWP, year-round or seasonally, or else wholly in lieu of such operations. Pertaining to such potential substitute or exchange supplies, see, also, the related provisions of Water Code sections 11460 and 11463.

<sup>44</sup> See Water Code, § 1700, *et seq.*, including §§ 1701, 1701.1, 1701.2, 1703.1, 1703.2, 1701.6. 1704.

<sup>45</sup> See also, legislative declaration in Water Code, § 13000, *et seq.*

<sup>46</sup> “Statement of Policy with Respect to Maintaining High Quality of Water in California,” State Water Resources Control Board Resolution No. 68-16 (Oct. 28, 1968). (See document attached entitled Attachment B.)

<sup>47</sup> 40 C.F.R. § 131.12, see attached document entitled Attachment C.

7. Water quality control planning requirements of the California Porter-Cologne Act,<sup>48</sup> including:
- a. The statement of legislative intent found in Water Code section 13000, declaring the state's "**primary interest** in the conservation, control, and utilization of the water resources of the state, and that the quality of **all** water of the state [ ] **be protected for use and enjoyment the people of the state**";
  - b. The related legislative directive found in section 13000 that "activities and factors which may affect the quality of the water of the state [ ] be regulated to attain **the highest water quality which is reasonable**, considering **all demands** being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible";
  - c. Additional statements of legislative intent concerning water quality and likewise found in section 13000 of the Water Code, including the directive concerning protection of water quality and prevention of "degradation."<sup>49</sup>
  - d. The responsibilities of the regional and state water quality control boards to "establish such water quality objectives in water quality control plans as in [their] judgment will **ensure the reasonable protection of beneficial uses and the prevention of nuisance**,"<sup>50</sup> and, in so doing, to consider various "**factors**" including, but not limited to:
    - i. "**Past, present, and probable future beneficial uses of water.**"
    - ii. "Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto."
    - iii. "**Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.**"
    - iv. "Economic considerations."<sup>51</sup>
8. The State and Regional Water Quality Control Boards' further responsibilities to establish an effective "program of implementation," in connection with an water objectives in any water quality control plan, to include, without limitation:
- a. "A description of the nature of **actions which are necessary to achieve the objectives**, including **recommendations for appropriate action by any entity, public or private.**"
  - b. "**A time schedule for the actions to be taken.**"

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<sup>48</sup> Water Code, § 13000, *et seq.*

<sup>49</sup> Concerning water quality, the Porter-Cologne Act, and the Federal Water Pollution Control Act, see also, Water Code, §§ 13160, 13170, 13170.1.

<sup>50</sup> Note: The Porter-Cologne Act's definition of a "nuisance," includes "anything which [...] [a]ffects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individual may be unequal." (See Water Code, § 13050, subd. (m). )

<sup>51</sup> Water Code, § 13241.

- c. “A description of surveillance to be undertaken to determine *compliance with objectives*.”<sup>52</sup>
9. The State Water Board’s joint “adjudicatory and regulatory functions” in the area of the water quality and water rights,<sup>53</sup> as well the reserved adjudicatory powers of the courts and of the State Water Board, including the Board’s latent powers and procedures described with respect to water rights adjudications under Water Code section 2000, *et seq.* and Water Code section 25000, *et seq.*,<sup>54</sup> as well as the ability of affected persons to bring actions to enforce compliance with established water quality standards through the courts, and the State Board’s powers to compel compliance with past orders and decisions of the board by means of its water rights permitting authorities.<sup>55</sup>
10. The policies of NEPA, as these pertain to water quality, water rights, and water supply, including:
- a. “Attain *the widest range of beneficial uses* of the environment *without degradation*, risk to health or safety, *or other undesirable and unintended consequences*,”<sup>56</sup>
  - b. “Use the NEPA process to identify and assess the *reasonable alternatives to proposed actions that will avoid or minimize adverse effects* of these actions upon the quality of the human environment,”<sup>57</sup>
  - c. “Use *all practicable means*, consistent with the requirements of [NEPA] *and other essential considerations of national policy*, to restore and enhance the quality of the human environment and *avoid or minimize any possible adverse effects* of [proposed] actions upon the quality of the human environment.”<sup>58</sup>
11. The policies and requirements of the CEQA as these relate, specifically, to water quality, including:
- a. The legislative declaration that “maintenance of a quality environment for the people of this state now and in the future is a matter of statewide concern.”<sup>59</sup>
  - b. The legislative declaration that is “the policy of the state” to:
    - i. “Develop and *maintain a high-quality environment now and in the future*, and take *all action necessary* to protect, rehabilitate, and enhance the environmental quality of the state”; and

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<sup>52</sup> Water Code, § 13242.

<sup>53</sup> See Water Code, § 174.

<sup>54</sup> With respect to statutory and court adjudications, see, especially, Water Code, §§ 2000, 2501, 2525, 2700, and 2768.

<sup>55</sup> See Water Code, § 1825, *et seq.*

<sup>56</sup> 42 U.S.C. § 4331(b)(3).

<sup>57</sup> 40 CFR § 1500.2, subd. (e).

<sup>58</sup> *Id.* at § 1500.2, subd. (f).

<sup>59</sup> Pub. Resources Code, § 21000, subd. (a).

- ii. “Take *all action necessary* to provide the people of this state with *clean air and water*, enjoyment of aesthetic, natural, scenic, and historic environmental qualities, and freedom from excessive noise.”<sup>60</sup>
  - c. Also, CEQA’s mandate that public agencies “should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects.”<sup>61</sup>
- 12. CEQA Guidelines Appendix G (“Environmental Checklist”), as that guidance document relates, without limitation, to potential adverse water quality- and water supply-related impacts of the proposed project or required consideration of alternatives, impacts, mitigation measures, and specific findings in the areas of “Agricultural Resources,” “Hydrology / Water Quality,” and any necessary “Mandatory Findings of Significance,” as follows:
  - a. Agricultural Resources: “Would the project...”
    - i. “[c]onvert Prime Farmland, Unique Farmland, or Farmland of Statewide Importance (Farmland), as shown on the maps prepared pursuant to the Farmland Mapping and Monitoring Program of the California Resources Agency, to non-agricultural use?”
    - ii. “[i]nvolve other changes in the existing environment which, due to their location or nature, could result in conversion of Farmland, to non-agricultural use?”
  - b. Hydrology and Water Quality: “Would the project...”
    - i. “[v]iolate any water quality standards or waste discharge requirements?”
    - ii. “[s]ubstantially alter the existing drainage pattern of the site or area, including through the alteration of the course of a stream or river[...].?”
    - iii. “[o]therwise substantially degrade water quality?”
  - c. Mandatory Findings of Significance:
    - i. “Does the project have the potential to degrade the quality of the environment[...].?”
    - ii. “Does the project have impacts that are individually limited, but cumulatively considerable[...].?”
    - iii. “Does the project have environmental effects which will cause substantial adverse effects on human beings, either directly or indirectly?”

<sup>60</sup> Pub. Resources Code., § 21001, subd. (a) and (b).

<sup>61</sup> Pub. Resources Code, § 21002. See, also, Pub. Resources Code, § 21002.1 (“Each public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so.”); Pub. Resources Code, § 21081.



### **Potential Integration with Future Surface and Groundwater Storage Projects**

California Farm Bureau has long advocated in favor of a significant expansion of capacity over and above the state's existing water storage infrastructure. Competition for limited supplies in California is intense and likely to intensify still further in the years and decades ahead. Environmental water needs in particular have grown exponentially over the last few decades, even as the state's population has roughly doubled—yet, during that time, the state's major water infrastructure has remained largely static.

Surface water storage has distinct advantages that water efficiency, groundwater storage, and other sources of water supply can certainly complement and enhance, but *not* replace. Meanwhile, long-term sustainability issues, along with reduced snowpack, intensifying drought and flood cycles, changing seasonal runoff patterns, increasing ambient and water temperatures, and rising sea levels associated with climate change, highlight the urgent need for new surface water storage facilities and improved regional and interregional conveyance.

Additional storage, both upstream and south of the Delta, in combination with possible new Delta conveyance facilities could greatly enhance system capacity to meet co-equal water supply and ecosystem goals. In particular, an enhanced ability to move water at opportune times (i.e., in wetter years and at less biologically sensitive times of the year) and in more environmentally friendly ways (through improved operations and screened diversions designed and located to avoid conflict with fish and ecosystem management goals) has great potential to improve system flexibility and sustainability statewide.

While surface water storage is currently outside of the scope of the BDCP, in seeking to address Delta conveyance and Delta ecosystem issues, the BDCP addresses two fundamental components of a general consensus that has recently emerged around what is, in essence, a single statewide strategy. Yet, while improvements to Delta conveyance and a stable and functioning ecosystem are a necessary part of this overall solution, so too is strategic investment in new surface water storage facilities with broad statewide benefits.

This was the conclusion reached by the Delta Vision Blue Ribbon Task Force in their initial Delta Vision Report in fall 2007:

“Existing Delta water conveyance systems are inadequate and must be improved. Similarly, existing groundwater and surface water storage capacity is inadequate and must be improved. Linking improvements in these two areas is critical to California's water future.... Current storage and conveyance systems often fail to meet competing expectations or even to allow accurate short-term predictions of water availability.... Any construction or change in the operations of conveyance facilities in the Delta must be ‘coupled’ to the construction and operations of storage facilities to ensure that the physical structures, timing, and operations of all facilities can be managed to meet all competing needs—for both environmental and economic

uses.” (Delta Vision Blue Ribbon Task Force Delta Vision Report, November 30, 2007 at pp. 12-13.)

The same conclusion was reiterated and reinforced in the Task Force’s Final Strategic Plan a year later:

“Achieving the co-equal goals requires a strategy that expands conveyance and storage options statewide and builds facilities that move water through and around the Delta.” (Delta Vision Final Strategic Plan, October 2008, p. 101.)

“New conveyance alone is not enough. Storage must be increased and smarter operation of existing reservoirs implemented, to improve reliability for water users and reduce risk to the environment. If flow managers are to have the flexibility to move water through or around the Delta at appropriate times, there must be places for the water to be stored until it is needed. This applies both to upstream locations (from which water could be released to increase Delta inflow), and to locations downstream of export diversions (from which users could access it directly).” (Strategic Plan, p. 102.)

“Any new water conveyance must allow flexibility in the timing and quantities of diversions to shift away from periods with highest impacts on Delta and upstream ecology while still providing predictable and acceptable volumes of quality water for diverted uses.” (Strategic Plan, p. 102.)

Equally importantly, the Delta Vision Task Force was consistent in the message that progress on the environment must go hand-in-hand with an adequate and reliable water supply for California’s economy:

“[Our] recommendations [on new storage, conveyance, and the Delta ecosystem] are inextricably linked. There won’t ever be a sustainable and reliable water supply without a vibrant Delta ecosystem. And the reverse is also true.” (Transmittal Letter to Governor for to Delta Vision Strategic Plan, October 2008.)

“[T]he Task Force’s Vision for the Delta and the following Strategic Plan are based on two co-equal goals: Restore the Delta ecosystem and create a more reliable water supply for California. They are co-equal goals because one objective can’t be achieved without the other.” (Delta Vision Strategic Plan, October 2008, p. v.)

Underscoring the growing consensus around the notion of a comprehensive strategy that emphasizes flexibility and sustainability through strongly linked storage, conveyance, and ecosystem elements, many of these same concepts were echoed in a series of “Planning Principles” identified in the Bay-Delta Conservation Plan’s January 2009 “Overview of the Draft Conservation Strategy for the Bay Delta Conservation Plan”:

BDCP Overview Planning Principle No. 2: “Divert More Water in the Wetter Periods and Less in Drier periods: An approach that shifts diversions away from sensitive ecological periods and locations would provide an opportunity to avoid the existing need to divert all water in excess of minimum regulatory requirements in drier periods, and would reduce conflicts between water supply and species conservation.”

BDCP Overview Planning Principle No. 4: “Build in Flexibility: Flexible water management infrastructure and operational criteria, and an adaptive regulatory regime are more likely to achieve both water supply and conservation objectives.”

BDCP Overview Planning Principle No. 6: “Provide for Reliable Water Supplies: Providing a reliable and sufficient water supply is essential for the state economy and to the success of the BDCP.”<sup>62</sup>

Additionally, while a summary of “Lessons Learned” from the same January 2009 BDCP Overview noted that limited existing South of Delta storage would continue to significantly constrain exports in the future, even with new conveyance, a hypothetical combination of such conveyance and a one million acre-feet increment in available storage could “significantly increase flexibility in meeting water supply and environmental objectives,” and that the “same is generally true [of potential new] North of Delta storage.” (BDCP Overview, “Lessons Learned,” p. 19.)

The general consensus, then, throughout much of the broader water user and water planning and stakeholder community, is that additional surface and groundwater storage, both north and south of the Delta, are an essential component of a long-term, sustainable solution to California’s complex and vexingly persistent water management problems. For new storage to provide far-reaching benefits, however, such storage must be sized, designed, and operated to provide the greatest flexibility and reliability to optimally satisfy *all* of the State’s competing needs, for as much of the state as possible.

A new, twenty-first century view of surface and groundwater storage must be taken by water users, state and federal agencies, and environmental advocates alike, that sees new storage neither in any calloused exploitative sense, nor as a symbol of environmental harm, but rather as a means to better reconcile competing needs through enhanced flexibility and reliability and, thus, achieve long-term sustainability.

Such policy concerns and recommendations are quite relevant to the scoping process of the BDCP EIR/EIS: For example, the CEQ’s NEPA regulations direct lead agencies to “[i]ndicate any public environmental assessments and other environmental impacts statements which are being or will be

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<sup>62</sup> BDCP Overview, pp. 9-10.

May 14, 2009

FWS (Lori Rinek); DWR (Delores Brown)

BDCP EIR/EIS; State Clearinghouse No: 2008032062

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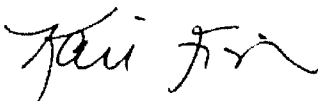
prepared that are related to but are not part of the scope of the impact statement under consideration.”<sup>63</sup>

Given the long-term 50-year planning horizon of the BDCP, California Farm Bureau sees potential future storage improvements currently outside of the scope of the BDCP as both closely related to, and imminently compatible with proposed Delta conveyance and ecosystem improvements in the BDCP. In this context, it is our strong recommendation that the lead agencies consider the potential for possible integration between the BDCP EIR/EIS and subsequent environmental documents for future water storage projects, by way of existing tiering, staging, supplemental EIR, and other similar provisions of NEPA and CEQA.<sup>64</sup>

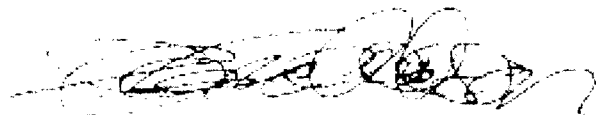
### **Conclusion**

California Farm Bureau recognizes that the status quo is unacceptable and improved conveyance is needed. We applaud the Agencies for addressing conveyance improvements in a forthright and decisive manner. The foregoing comments are provided in the manner of constructiveness to ensure adequate environmental review. Thank you for the opportunity to provide our comments. We look forward to further involvement and discussion with the Agencies on the development of the Bay Delta Conservation Project.

Sincerely,



**Kari E. Fisher**  
Associate Counsel



**Justin E. Fredrickson**  
Environmental Policy Analyst

KEF\JEF\mmm

cc:

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<sup>63</sup>40 C.F.R. § 1501.7(a)(6).

<sup>64</sup> See Pub. Resources Code, § 21093; Cal. Code Regs., tit. 14, §§ 15152, 15385, 15162, 15163, and 15167; 40 C.F.R. §§ 1502.9(c), 1502.20.

# **Attachment A**

9-8-80  
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Pages 59135-59296

# federal register

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Monday  
September 8, 1980

## COUNCIL ON ENVIRONMENTAL QUALITY

### Publishing of Three Memoranda for Heads of Agencies

August 20, 1980.

The Council on Environmental Quality is publishing three Memoranda for Heads of Agencies.

The first memorandum, dated August 11, 1980, on Analysis of Impacts on Prime and Unique Agricultural Lands in Implementing the National Environmental Policy Act was developed in cooperation with the Department of Agriculture. It updates and supersedes the Council's previous memorandum on this subject of August 1978.

The second memorandum, dated August 11, 1980, requests information on agency agricultural land policies and other information related to the implementation of the first memorandum.

The third memorandum, dated August 10, 1980, on Interagency Consultation to Avoid or Mitigate Adverse Effects on Rivers in the Nationwide Inventory is intended to assist federal agencies in meeting their responsibilities under the President's August 2, 1979 directive.

Edward L. Strohbehn, Jr.,  
Executive Director.

Executive Office of the President,  
Council on Environmental Quality,  
722 Jackson Place, NW., Washington, D.C.  
August 11, 1980.

Memorandum for Head of Agencies

Subject: Analysis of Impacts on Prime or Unique Agricultural Lands in Implementing the National Environmental Policy Act

Approximately one million acres of prime or unique agricultural lands<sup>1</sup> are being converted irreversibly to nonagricultural uses each year. Actions by federal agencies such as construction activities, development grants and loans, and federal land management decisions frequently contribute to the loss of prime and unique agricultural lands directly or indirectly. Often these losses are

<sup>1</sup> As used in this memorandum, prime and unique agricultural land is cropland, pastureland, rangeland, forest land or other land, but not urban built-up land, which is capable of being used as prime and unique farmland as defined by the Department of Agriculture (see attachment) [The attachment to this memorandum was § 657.5 of title 7 CFR.]

unintentional and are not necessarily related to accomplishing the agency mission.

On August 30, 1978, CEQ, in cooperation with the Department of Agriculture, issued a memorandum to the heads of federal agencies on the need for analysis of prime or unique farmlands in the preparation and review of environmental impact statements. The memorandum also recommended steps for agencies to take in making such analyses. Since that memorandum was issued, federal agencies' environmental impact statements have begun to include references to the presence of prime or unique farmlands that would be affected by the proposed federal action. Moreover, they have clearly indicated that many federal and federally assisted projects have direct and indirect adverse impact on prime or unique farmlands.

Recent studies by the Council and the General Accounting Office indicate that federal agencies have not adequately accounted for the impacts of their proposed actions on agricultural land through the environmental assessment process. Furthermore, agency project plans and decisions have frequently not reflected the need and opportunities to protect these lands. The purpose of this memorandum is to alert federal agencies to the need and the opportunities to analyze agricultural land impacts more effectively in the project planning process and under the National Environmental Policy Act (NEPA).

Agencies can substantially improve their analysis of impacts on prime or unique agricultural lands by following closely our recently established NEPA regulations (40 CFR 1500-1508, Nov. 29, 1978). The regulations apply to these lands in several specific respects. Determining the effects of a proposed federal agency action on prime or unique agricultural lands must be an integral part of the environmental assessment process, and must be a factor in deciding whether or not to prepare an environmental impact statement. For example, when an agency begins planning any action, it should, in the development of alternative actions, assess whether the alternatives will affect prime or unique agricultural lands. Then, recognizing the importance of these lands and any significant impacts that might affect them, it must study, develop, and describe appropriate alternative uses of available resources. (Sec. 1501.2(c).)

In determining whether to prepare an environmental impact statement, the regulations note that the "Unique characteristics of the geographic area such as . . . prime farmlands . . ." (Sec. 1508.2(b)(3)) must be considered, among others. If an agency determines that a proposal significantly affect the quality of the human environment, it must initiate the scoping process (Sec. 1501.7) to identify those issues, including effects on prime or unique agricultural lands, that will be analyzed and considered, along with the alternatives available to avoid or mitigate adverse effects. An environmental impact statement must include a description of the area that will be affected by the proposed action (Sec. 1502.15) and an analysis of the environmental consequences of the proposal, including a discussion of "natural or depletable resource

requirements and conservation potential or various alternative and mitigation measures" (Sec. 1502.16(f)). These resource requirements include prime or unique agricultural lands. The effects to be studied encompass indirect effects that may include "growth inducing effects and other effects related to induced changes in the pattern of land use . . ." (Sec. 1508.8(b)). The cumulative effects of a proposal must be studied (Secs. 1508.7, 1508.8(b)), as must any mitigation measures that could be taken to lessen the impact on prime or unique agricultural lands (Secs. 1505.2(c), 1508.20). Agencies must also cooperate with state or local governments in their efforts to help retain these lands (Secs. 1502.16(c), 1508.2(d)).

Federal agencies with technical data on the occurrence, value, or potential impacts of federal actions on these lands will provide the lead agency with data that may be useful in preparing environmental assessments or impact statements. The U.S. Department of Agriculture will cooperate with all agencies in planning projects or developments, in assessing impacts on prime or unique agricultural lands, and in defining alternatives. Technical data as assistance regarding agricultural land may be obtained by contacting the Chairperson of the USDA Land Use Committee (list attached) or any USDA office. In addition to providing technical data and assistance, the USDA will continue to emphasize the review of EISs on federal actions likely to have significant effects on prime and unique farmlands. Under Section 1504 of the regulations, USDA should refer to CEQ those proposed federal actions which it believes will be environmentally unsatisfactory because of unacceptable effects on prime or unique farmlands. CEQ will review such referrals, and take necessary steps in accordance with Section 1504 of our regulations.

Because prime and unique agricultural lands are a limited and valuable resource, the Council urges all agencies to make a particularly careful effort to apply the goals and policies of the National Environmental Policy Act to their actions and to obtain necessary assistance in their planning processes so that these lands will be maintained to meet our current national needs and the needs of future generations of Americans.

Gus Speth,  
Chairman.

Attachments.

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- Mr. James H. Hansen, State Resource Conservationist, Soil Conservation Service,

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- Mr. William E. Austin, State Conservationist, Soil Conservation Service, P.O. Box 1208, Gainesville, Florida 32601
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- Mr. George C. Marks, State Conservationist, Soil Conservation Service, P.O. Box 648, Temple, Texas 76501
- Mr. Reed Page, State Director of the Farmers Home Administration, 125 South State St., Rm. 5434, Salt Lake City, Utah 84138
- Mr. Coy Garrett, State Conservationist, Soil Conservation Service, One Burlington Square, Suite 205, Burlington, Vermont 05401
- Mr. Manly S. Wilder, State Conservationist, Soil Conservation Service, 400 North Eighth Street, P.O. Box 10028, Richmond, Virginia 23240
- Mr. Lester N. Liebel, Ext. Rural Development Coord., Cooperation Extension Service, Washington State University, 417, Ag. Phase II, Pullman, Washington 99163
- Mr. Craig M. Right, State Conservationist, Soil Conservation Service, P.O. Box 865, Morgantown, West Virginia 26505
- Mr. Jerome C. Hytry, State Conservationist, Soil Conservation Service, 4601 Hammersley Road, Madison, Wisconsin 53711
- Mr. Robert W. Cobb, Assistant State Conservationist, Soil Conservation Service, P.O. Box 2440, Casper, Wyoming 82601

Executive Office of the President,  
Council on Environmental Quality,  
722 Jackson Place, NW., Washington, D.C.  
August 11, 1980.

#### Memorandum for Heads of Agencies

**Subject: Prime and Unique Agricultural Lands and the National Environmental Policy Act (NEPA)**

The accompanying memorandum on Analysis of Impacts on Prime or Unique Agricultural Lands in Implementing the National Environmental Policy Act was developed in cooperation with the Department of Agriculture. It updates and supersedes the Council's previous memorandum on this subject of August 1978.

In order to review agency progress or problems in implementing this memorandum the Council will request periodic reports from Federal agencies as part of our ongoing oversight of agency implementation of NEPA and the Council's regulations. At this time we would appreciate receiving from your agency by November 1, 1980, the following information:

- identification and brief summary of existing or proposed agency policies, regulations and other directives specifically intended to preserve or mitigate the effects of agency actions on prime or unique agricultural lands, including criteria or methodology used in assessing these impacts.
- identification of specific impact statements and, to the extent possible, other documents prepared from October 1, 1979 to October 1, 1980 covering actions deemed likely to have significant direct or indirect effects on prime or unique agricultural lands.
- the name of the policy-level official responsible for agricultural land policies in your agency, and the name of the staff-level official in your agency's NEPA office who will be responsible for carrying out the actions discussed in this memorandum.

Gus Speth,  
Chairman.

Executive Office of the President,  
Council on Environmental Quality,  
722 Jackson Place, NW., Washington, D.C.  
August 10, 1980.

#### Memorandum for Heads of Agencies

**Subject: Interagency Consultation to Avoid or Mitigate Adverse Effects on Rivers in the Nationwide Inventory**

In his second Message on the Environment, issued in August 1979, the President underscored the need to strengthen the National Wild and Scenic Rivers System and to take particular care not to harm rivers



which may qualify for inclusion in the System.

The President issued a directive on August 2, 1979 in conjunction with his Message which required that:

"Each Federal agency shall, as part of its normal planning and environmental review process, take care to avoid or mitigate adverse effects on rivers identified in the Nationwide Inventory prepared by the Heritage Conservation and Recreation Service in the Department of the Interior. Agencies shall, as part of their normal environmental review process, consult with the Heritage Conservation and Recreation Service prior to taking actions which could effectively foreclose wild, scenic, or recreational river status on rivers in the Inventory."

This memorandum is intended to assist your agency in meeting its responsibilities under the President's directive. A brief set of procedures is attached which provides guidance on how to integrate these responsibilities with your normal environmental analysis process under the National Environmental Policy Act (NEPA). The objective is to ensure that the President's directive is met promptly and efficiently.

Development along our rivers continues to outpace our ability to protect those rivers that might qualify for designation in the National Wild and Scenic Rivers System. The Heritage Conservation and Recreation Service (HCRS) in the Department of the Interior has been preparing a Nationwide Inventory of river segments that, after preliminary review, appear to qualify for inclusion in the System. It is therefore essential that federal agencies proceed carefully and limit any adverse effects of their actions on rivers identified in the Nationwide Inventory. Otherwise, the Inventory could be depleted before the identified rivers can be fully assessed to determine the desirability of including them as components of the National Wild and Scenic Rivers System.

Although the President's directive does not prohibit an agency from taking, supporting or allowing an action which would adversely affect wild and scenic values of a river in the Inventory, each agency is responsible for studying, developing and describing all reasonable alternatives before acting, and for avoiding and mitigating adverse effects on rivers identified in the Inventory. Where agency action could effectively foreclose the designation of a wild, scenic, or recreational river segment, the President has directed the agency to consult with HCRS. It is difficult to restore a river and its immediate environment once its wild and scenic qualities have been lost.

The purpose of this consultation requirement, which is meant to be part of the normal environmental analysis process, is to provide the opportunity for HCRS experts to assist other agencies in meeting program objectives without irreparably damaging potential wild, scenic, and recreational river areas. Consultation with HCRS should encourage better planning at an early stage in order to reduce resource management conflicts or to avoid them altogether. The consultation requirement also provides an

opportunity to seek early resolution of problems by policy-level officials if necessary.

Completed portions of the Nationwide Inventory—those for the Eastern half of the country—were sent to you from HCRS Director Chris T. Delaporte on November 13, 1979. Forthcoming portions of the Inventory will be transmitted as they are completed. You should ensure that the list of rivers in the Inventory and the attached procedures receive wide distribution in your agency.

Copies of orders, guidance, or memoranda which you use to adopt or to transmit the attached procedures within your agency should be sent to the Council on Environmental Quality (Attention: Larry Williams) and to the Interagency Wild and Scenic Rivers Study Group (Attention: Jack Hauptman, HCRS, 440 G Street, N.W., Washington, D.C. 20243).

Gus Speth,

Chairman.

Attachment.

*Procedures for Interagency Consultation to Avoid or Mitigate Adverse Effects on Rivers in the Nationwide Inventory*

These procedures are designed to assist federal officials in complying with the President's directive (attached) to protect rivers in the Nationwide Inventory through the normal environmental analysis process. NEPA, E.O. 11514, CEQ's NEPA Regulations, and agency implementing procedures should be used to meet the President's directive.

Although the steps outlined below pertain to wild and scenic river protection, they also fit clearly within agencies' existing environmental analysis processes. Agencies are already required: to identify and analyze the environmental effects of their actions; to consult with agencies with jurisdiction by law or special expertise (in this case, HCRS); to develop and study alternatives; and to use all practicable means and measures to preserve important historic, cultural, and natural aspects of our national heritage.

The procedures outlined below simply link the appropriate elements of the normal environmental analysis process with the President's directive "to take care to avoid or mitigate adverse effects on rivers identified in the Nationwide Inventory." Federal officials should promptly take steps to incorporate the actions specified below into their planning and decisionmaking activities and the conduct of their environmental analyses.

*1. Determine whether the proposed action could affect an Inventory river.*

Check the current regional Inventory lists to determine whether the proposed action could affect an Inventory river.

If an Inventory river could be affected by the proposed action, an environmental assessment or an environmental impact statement may be required depending upon the significance of the effects.

If the action would not affect an Inventory river, no further action is necessary under these procedures. (The agency is still required to fulfill any other responsibilities under NEPA).

*2. Determine whether the proposed action could have an adverse effect on the natural,*

*cultural and recreational values of the Inventory river segment.*

Using the Guide for Identifying Potential Adverse Effects, which is appended to these procedures, you should determine whether the proposed action could adversely affect the natural, cultural, or recreational values of the Inventory river segment. Adverse effects on inventoried rivers may occur under conditions which include, but are not limited to:

- (1) Destruction or alteration of all or part of the free flowing nature of the river;
- (2) Introduction of visual, audible, or other sensory intrusions which are out of character with the river or alter its setting;
- (3) Deterioration of water quality; or
- (4) Transfer or sale of property adjacent to an inventoried river without adequate conditions or restrictions for protecting the river and its surrounding environment.

If you have prepared a document which finds that there would be no adverse effects—such as a Finding of No Significant Impact under the CEQ NEPA regulations—you should send a courtesy copy to the HCRS field office in your region.

*3. Determine whether the proposed action could foreclose options to classify any portion of the Inventory segment as wild, scenic or recreational river areas.*

In some cases, impacts of a proposed action could be severe enough to preclude inclusion in the Wild and Scenic Rivers System, or lower the quality of the classification (e.g. from wild to recreational). If the proposed undertaking would effectively downgrade any portion of the Inventory segment you should consult with HCRS.

Proposed actions (whether uses or physical changes), which are theoretically reversible, but which are not likely to be reversed in the short terms, should be considered to have the effect of foreclosing for all practical purposes wild and scenic river status. This is because a river segment, when studied for a possible inclusion in the Wild and Scenic River System, must be judged as it is found to exist at the time of the study, rather than as it may exist at some future time.

If a proposal, including one or more alternatives, could have an adverse effect on a river in the Inventory, an environmental assessment or, if the effects are significant, an environmental impact statement must be prepared. HCRS staff is available to assist you in determining the significance or severity of the effects in connection with your assessment, scoping process, and EIS, if one is needed. A detailed analysis of each of the rivers in the Inventory is available from HCRS for your use.

You should request assistance in writing from HCRS, as early as you can, providing sufficient information about the proposal to allow HCRS to assist you in determining whether any of the alternatives under consideration would foreclose designation. HCRS will in turn provide you with an analysis of the impacts on natural, cultural and recreational values which should enable you to make a determination as to whether or not designation would be foreclosed. HCRS is available to assist you in developing appropriate avoidance/mitigation measures.

When environmental assessments are prepared on proposals that affect Inventory

rivers, copies should be sent in a timely fashion to the HCRS field office in your area before a proposed action is taken and while there is still time to avoid or mitigate adverse effects. When environmental impact statements are prepared on proposals that affect inventory rivers the lead agency should request HCRS and the affected land managing agency to be cooperating agencies as soon as the Notice of Intent to prepare an EIS has been published.

If HCRS does not respond to your request for assistance within 30 days, you may proceed with completing preparation and circulation of the environmental assessment or EIS as planned. Even where HCRS has been unable to comment on the environmental assessment or Draft EIS, you are still obligated by the President's directive to "... take care to avoid or mitigate adverse effects on rivers identified in the Nationwide Inventory . . ."

**4. Incorporate avoidance/mitigation measures into the proposed action to maximum extent feasible within the agency's authority.**

Any environmental documents prepared on the proposed action should identify the impacts on natural, cultural and recreational values, address the comments submitted by HCRS, and state the avoidance/mitigation measures adopted. Any disagreements will be resolved through existing procedures. For projects requiring environmental impact statements, the record of decision must adopt appropriate avoidance/mitigation measures and a monitoring and enforcement program as required by the CEQ regulations. (40 CFR 1505.2(c)).

**A Note on the Meaning of "Federal Actions"**

The above procedures are meant to apply to all federal actions that could adversely affect a river in the Nationwide Inventory (see Section 1508.18 of CEQ's NEPA Regulations (40 CFR 1508.18) for the meaning of "major federal actions"). For actions which are known in advance to require an environmental assessment or environmental impact statement these procedures would be followed in the normal course of NEPA compliance. If a federal action would *not* normally require an environmental assessment or an environmental impact statement, but could adversely affect a river in the Nationwide Inventory, the action should either (1) not be "categorically excluded" under agency implementing procedures, or (2) be considered an "extraordinary circumstance" in which a normally excluded action must be subjected to environmental analysis (see Section 1508.4 of NEPA Regulations).

The above procedures should be used for any proposals (including the evaluation of alternative courses of action) for which the NEPA process is not yet completed. The above procedures should therefore also be applied to a proposed modification or supplement to a previously authorized or implemented action.

**For Further Information or Guidance**

The HCRS regional office will usually provide the best source of information on rivers in the Nationwide Inventory and on

specific ways that these rivers could be protected. For general assistance on policy and procedural matters, please contact the Chairman of the Interagency Wild and Scenic Rivers Study Group (202/343-4793), or contact the Council on Environmental Quality (202/395-4540).

**Appendix I.**

**Guide for Identifying Potential Adverse Effects**

The impact of a proposed action should be assessed in relation to the eligibility and classification criteria of the Wild and Scenic Rivers Act, 16 U.S.C. 1271-1287, as amended.

In order to be eligible for inclusion in the National System, a river must:

1. Be "free-flowing," i.e., "existing or flowing in natural condition without impoundment, diversion, straightening, rip-rapping, or other modification of the waterway. The existence, however, or low dams, diversion works, and other minor structures at the time any river is proposed for inclusion in the national wild and scenic rivers system shall not automatically bar its consideration for such inclusion: *Provided*, That this shall not be construed to authorize, intend, or encourage future construction of such structures within components of national wild and scenic rivers system." (16 U.S.C. Sec. 1286)
2. Possess "outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values." (16 U.S.C. Sec. 1271)

Eligible river segments are classified according to the extent of evidence of man's activity as one of the following:

1. "Wild river areas—Those rivers or sections of rivers that are free of impoundments and generally inaccessible except by trail, with watersheds or shorelines essentially primitive and waters unpolluted. These represent vestiges of primitive America."
2. "Scenic river areas—Those rivers or sections of rivers that are free of impoundments, with shorelines or watersheds still largely primitive and shorelines largely undeveloped, but accessible in places by roads."
3. "Recreational river areas—Those rivers or sections of rivers that are readily accessible by road or railroad, that may have some development along their shorelines, and that may have undergone some impoundment or diversion in the past." (16 U.S.C. Sec. 1273(b))

Any action which could alter the river segment's ability to meet the above eligibility and classification criteria should be considered an adverse impact. Actions which diminish the free-flowing characteristics or outstandingly remarkable values of a river segment could prevent the segment from qualifying for inclusion in the national system. Actions which increase the degree of evidence of man's activity, i.e., level of development, could change the classification of the river segment.

The effect of all proposed developments within the river corridor should be assessed in terms of severity of effect and extent of area affected. Development outside the corridor which would cause visual, noise, or

air quality impacts on the river corridor should also be examined.

Only proposed new construction or proposed expansion of existing developments need be considered in assessing impacts. Repair or rehabilitation of existing structures would not have a negative impact except if the action would result in significant expansion of the facility or if the construction process itself would cause an irreversible impact on the environment.

Placement of navigation aids such as buoys and channel markers will not be considered as causing adverse effects.

The following are examples of types of developments which would generally require consultation with HCRS because of the potential for adverse effects on the values of a potential wild, scenic, or recreational river. The list is not exhaustive.

Small dock	Road
Small bulkhead	Railroad
Clearing and snagging	Building (any type)
Drainage canal, culvert or outfall	Pipeline, transmission line
Irrigation canal	Bridge or ford
Leaves or dikes	Gas, oil or water well
Rip-rap, bank stabilization or erosion control structure	Sub-surface mine opening
Small reservoir	Quarry
Increase in commercial navigation	Power substation
Dredging or filling	Recreation area
Run-of-the-river dam or diversion structure	Dump or junkyard
	Change in flow regime
	Clear-cut timber harvest
	Radio tower, windmill

The following are examples of types of development which appear most likely to cause serious adverse effects if they are constructed adjacent to or in close proximity to an inventory river. Such development proposals will almost always require consultation with HCRS because their effects are likely to conflict with the values of a potential wild, scenic or recreational river. These effects could be severe enough to foreclose designation of the affected river segment. This list is not exhaustive.

Impoundment	Major highway
Channelization	Railroad yard
Instream or surface mining	Power plant
Lock and dam	Sewage treatment plant
Airport	Housing development
Landfill	Shopping center
Factory	Industrial park
Gas or oil field	Marina
	Commercial dock

**Appendix II**

(For a memorandum from the President on Wild and Scenic Rivers and National Trails dated August 2, 1978, see the *Weekly Compilation of Presidential Documents* (Vol. 15, page 1379).)

[FR Doc. 80-27023 Filed 9-5-80; 9:45 am]

BILLING CODE 3125-01-M

## **Attachment B**

STATE WATER RESOURCES CONTROL BOARD

RESOLUTION NO. 68-16

STATEMENT OF POLICY WITH RESPECT TO  
MAINTAINING HIGH QUALITY OF WATERS IN CALIFORNIA

WHEREAS the California Legislature has declared that it is the policy of the State that the granting of permits and licenses for unappropriated water and the disposal of wastes into the waters of the State shall be so regulated as to achieve highest water quality consistent with maximum benefit to the people of the State and shall be controlled so as to promote the peace, health, safety and welfare of the people of the State; and

WHEREAS water quality control policies have been and are being adopted for waters of the State; and

WHEREAS the quality of some waters of the State is higher than that established by the adopted policies and it is the intent and purpose of this Board that such higher quality shall be maintained to the maximum extent possible consistent with the declaration of the Legislature;

NOW, THEREFORE, BE IT RESOLVED:

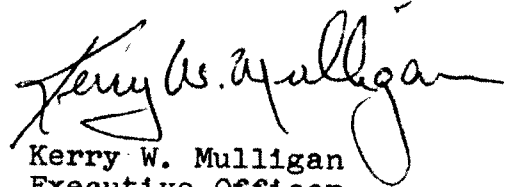
1. Whenever the existing quality of water is better than the quality established in policies as of the date on which such policies become effective, such existing high quality will be maintained until it has been demonstrated to the State that any change will be consistent with maximum benefit to the people of the State, will not unreasonably affect present and anticipated beneficial use of such water and will not result in water quality less than that prescribed in the policies.
2. Any activity which produces or may produce a waste or increased volume or concentration of waste and which discharges or proposes to discharge to existing high quality waters will be required to meet waste discharge requirements which will result in the best practicable treatment or control of the discharge necessary to assure that (a) a pollution or nuisance will not occur and (b) the highest water quality consistent with maximum benefit to the people of the State will be maintained.
3. In implementing this policy, the Secretary of the Interior will be kept advised and will be provided with such information as he will need to discharge his responsibilities under the Federal Water Pollution Control Act.

BE IT FURTHER RESOLVED that a copy of this resolution be forwarded to the Secretary of the Interior as part of California's water quality control policy submission.

#### CERTIFICATION

The undersigned, Executive Officer of the State Water Resources Control Board, does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on October 24, 1968.

Dated: October 28, 1968

A handwritten signature in cursive script, appearing to read "Kerry W. Mulligan".

Kerry W. Mulligan  
Executive Officer  
State Water Resources  
Control Board

## **Attachment C**



1 of 1 DOCUMENT

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\*\*\* THIS SECTION IS CURRENT THROUGH THE MAY 7, 2009 ISSUE OF \*\*\*  
\*\*\* THE FEDERAL REGISTER \*\*\*

TITLE 40 -- PROTECTION OF ENVIRONMENT  
CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY  
SUBCHAPTER D -- WATER PROGRAMS  
PART 131 -- WATER QUALITY STANDARDS  
SUBPART B -- ESTABLISHMENT OF WATER QUALITY STANDARDS

**Go to the CFR Archive Directory**

*40 CFR 131.12*

§ 131.12 Antidegradation policy.

(a) The State shall develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy pursuant to this subpart. The antidegradation policy and implementation methods shall, at a minimum, be consistent with the following:

(1) Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.

(2) Where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully. Further, the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control.

(3) Where high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected.

(4) In those cases where potential water quality impairment associated with a thermal discharge is involved, the antidegradation policy and implementing method shall be consistent with section 316 of the Act.

**HISTORY:** *48 FR 51405*, Nov. 8, 1983.

**AUTHORITY:** *33 U.S.C. 1251* et seq.

**NOTES:** NOTES APPLICABLE TO ENTIRE CHAPTER:

[PUBLISHER'S NOTE: Nomenclature changes to Chapter I appear at *65 FR 47323, 47324, 47325*, Aug. 2, 2000.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Notice of implementation policy, see: 71 *FR* 25504, May 1, 2006.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING SECTION --

*Ky. Waterways Alliance v Johnson* (2006, *WD Ky*) 426 *F Supp 2d* 612

296 words